

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of)	NOTICE OF AMENDMENT
ARM 42.9.101, 42.9.104, 42.9.105,)	
42.9.106, 42.9.111, 42.9.201,)	
42.9.401, 42.9.501, 42.9.510,)	
42.9.520, and 42.9.530 relating to)	
pass-through entities)	

TO: All Concerned Persons

1. On December 20, 2012, the department published MAR Notice Number 42-2-891 regarding the proposed amendment of the above-stated rules at page 2578 of the 2012 Montana Administrative Register, Issue Number 24.

2. A public hearing was held on January 14, 2013, to consider the proposed amendment. Mr. Leo Berry, Attorney for the National Association of Publicly Traded Partnerships (NAPTP), appeared and testified at the hearing. Ms. Lindsay Sander, of NAPTP, and Ms. Nancy Higgins Schlepp, President of the Montana Taxpayers Association (MonTax), submitted written comments. The oral and written comments received are summarized as follows, along with the responses of the department:

COMMENT 1: Mr. Berry and Ms. Sander commented on ARM 42.9.106, relative to current language and the proposed amendments. Because the NAPTP has worked proactively with the department for years on a number of issues, and due to the extensive work that has been done, they wish to clarify the intent of the rule, and reinforce comments they made regarding multi-tier pass-through entities when the department proposed rule amendments in 2011.

At that time, it was unclear how the proposed rules impacted publicly traded partnerships (PTPs) and their lower-tier partnerships. PTPs are unable to comply with composite return and withholding provisions required by Montana rules. Section 15-30-3313(7), MCA and the current rules, provide for an exemption for PTPs if certain information is provided to the department annually.

However, ARM 42.9.106 requires the first-tier partnership to file a composite return and withhold from the second-tier partnerships. For some PTPs, the PTP is the second-tier partnership. Despite PTPs having an exemption from the requirements when they are a first-tier partnership, they are not exempted in this scenario. It is not administratively possible to notify the department of ownership changes that occur with the second-tier PTP, as required in ARM 42.9.106(5).

Changes to the existing rule were adopted in November 2011. During that rulemaking, amendments were proposed that allowed the owners of the lower-tier partnership to claim the tax paid as a refundable credit against their tax liability. No Montana statute or rule addressed how the lower-tier pass-through entities of PTPs would be treated in light of the exemption from withholding for the PTP itself. The NAPTP respectfully asserted then, as it does now, that the lower-tier pass-through entities of the PTP should be exempt from withholding under this provision.

Such an exemption would address burdens that occur when a lower-tier

partnership withholds on other lower-tier partnerships, all of which are owned by the PTP. The PTP must then apply to have the withheld tax refunded. One entity pays in only to have the related entity seek the same amount back. This creates an unnecessary burden for both the entities and the department. The NAPTP has approached numerous states regarding this issue, and they have found it appropriate to extend the exemption from withholding to the lower-tier pass-through entities as well as to the PTP.

The proposed rule established a provision that permitted the department to waive the requirement to remit tax or pay composite tax if certain conditions are met. The first condition requires the first-tier pass-through entity to obtain from the second-tier pass-through entity a completed Form PT-STM and file it 45 days prior to the deadline for a first-tier pass-through entity. The NAPTP respectfully submits now, as it did in 2011, that there is no way to make or even encourage a second-tier partnership to file forms with the department, especially in an advanced or accelerated time frame.

The second condition requires an entity to prove to the department that all of its distributive share of Montana sourced income will be fully accounted for through the appropriate income, corporate, and other taxes filed with the state. This places an almost impossible requirement on all entities and shifts the burden of tax enforcement from the department to businesses, which cannot be responsible for the enforcement of the state's tax laws.

The NAPTP considers PTPs to be at the top of an entity's structure pyramid and the partnerships, LLCs, or corporations owned by the PTP to be below, or lower-tier, entities. NAPTP expressed the importance to note this because of historical discussions with the department in which each group had a different understanding of what constitutes a higher- or lower-tier partnership.

The NAPTP respectfully submits that no purpose is served by offering a waiver process to businesses based on conditions that will be difficult if not impossible to achieve. If the department cannot provide an exemption from ARM 42.9.106(2)(b) and (3), the department could amend (7), to also exempt PTPs from the requirements in (2),(3),(4), and (5).

Ms. Schlepp commented that the way the change to the rule is drafted, the exemption for PTPs only applies to those that are first-tier pass-through entities. She stated that MonTax requests amendments to ensure that second-tier PTPs be specifically exempted from ARM 42.9.106(2),(3),(4), and (5). Second-tier PTPs cannot comply with (2)(b) and (3), and establish that its Montana source income is fully accounted for in its unit holders' Montana tax returns. Nor is it administratively possible to notify the department of ownership changes of second-tier PTPs as required in (5). As a rule, lower-tier pass-through entities of PTPs should be exempt from withholding and composite returns.

RESPONSE 1: The department appreciates the comments from Mr. Berry, Ms. Sander, and Ms. Schlepp on this proposed rulemaking action. It is important to distinguish that their comments primarily reference previous amendments made to ARM 42.9.106, in 2011. The proposed amendments in this current rulemaking action do not substantially change the rule. As set forth in the reasonable necessity, the amendments address administrative issues such as a word capitalization and

the removal of outdated references to a discontinued form. The administrative amendments also update the options for submitting forms.

Having recently developed the functionality to receive the Form PT-STM electronically, the department seeks to clarify for taxpayers and preparers that the completed form (electronic or hard copy) need not be submitted to the first-tier entity for filing, but may be sent directly to the department by the second-tier entity, for efficiency. Furthermore, the rule clarifies that regardless of who files the form, the first-tier entity remains responsible for ensuring that the PT-STM is timely filed with the department.

The concerns expressed by Mr. Berry, Ms. Sander, and Ms. Schlepp in regard to ARM 42.9.106 are appreciated. However, the department has determined that their concerns warrant further study and discussion, and should be addressed in a separate rulemaking action, rather than during this biennial rule review housekeeping process.

COMMENT 2: Mr. Berry and Ms. Sander stated that the NAPTP would like to meet with the department, prior to any final rule adoption, to discuss the proposed rules, and Ms. Schlepp expressed an interest in participating in any such meeting.

RESPONSE 2: The requesting individuals arranged for and conducted a meeting with the department, for a general discussion about pass-through entities. The meeting was conducted separately from, and does not have an impact on, this particular rulemaking action. As discussed at the meeting, the department looks forward to working with representatives from NAPTP, MonTax, the MSCPA, and other parties in the interim prior to the 2015 Montana Legislative Session, to address various issues regarding the administration of pass-through entities.

3. The department amends ARM 42.9.101, 42.9.104, 42.9.105, 42.9.106, 42.9.111, 42.9.201, 42.9.401, 42.9.501, 42.9.510, 42.9.520, and 42.9.530 as proposed.

4. An electronic copy of this notice is available on the department's web site at www.revenue.mt.gov. Select the "Laws and Rules" link in the left hand column, and click on the "Rules" link within to view the options under the "Current Rule Actions – Published Notices" heading. The department strives to make the electronic copy of this notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. While the department also strives to keep its web site accessible at all times, in some instances it may be temporarily unavailable due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Mike Kadas
MIKE KADAS
Director of Revenue

Certified to Secretary of State March 18, 2013